A

## JITWEER SINGH OJAGAR SINGH v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
HARMINDAR SINGH DHALIWAL JCA
B [CRIMINAL APPEAL NO: B-05-184-07-2014]
27 JULY 2016

C ***CRIMINAL LAW:*** *Penal Code – Section 302 – Murder – Appeal against conviction and sentence – Circumstantial evidence – Whether circumstantial evidence pointed to irresistible conclusion of guilt – Whether defence case properly evaluated – Whether conviction and sentence safe*

***EVIDENCE:*** *Circumstantial evidence – Murder – Whether circumstantial evidence pointed to irresistible conclusion of guilt – Whether conviction and sentence safe*

D ***EVIDENCE:*** *Expert evidence – Conflicting expert evidence – Manner in which conflicting expert opinion to be evaluated – Matters to be considered in evaluating conflicting expert opinion*

The accused ('appellant') was charged under s. 302 of the Penal Code for the murder of his wife ('the deceased'). The case for the prosecution was entirely
E circumstantial. The High Court ruled that, at the end of the prosecution's case, the prosecution failed to prove a *prima facie* case. Hence, the appellant was acquitted. The prosecution's appeal against the decision of the High Court was dismissed by the Court of Appeal. However, the Federal Court allowed the prosecution's appeal against the Court of Appeal's decision. The
F Federal Court accepted the forensic pathologist PW5's evidence that the deceased had been forcibly asphyxiated and that the cause of death was not accidental, not suicidal but homicidal. The Federal Court had also agreed that (i) the appellant was the only person with the deceased at the time of her death; (ii) the circumstantial evidence adduced showed that the accused's
G marital relationship with the deceased was an unhappy and turbulent one such that they were living apart; (iii) the deceased had been subjected to prior abuse by the accused; and (iv) there was a probability of the accused having an extra marital affair indicating a motive to kill. The Federal Court ordered for the defence of the appellant to be called and for the matter to be heard
H before the same High Court Judge ('HCJ'). During the defence stage, a forensic consultant pathologist ('DW4') testified that the symptoms and injuries sustained by the deceased were consistent with positional asphyxia and not asphyxia because of smothering pressure on the neck. The HCJ however criticised the defence theory of positional asphyxia as it was not raised during cross-examination of PW5 and held that it was a mere
I afterthought defence. Therefore, at the end of the appellant's defence, the

HCJ convicted and sentenced the appellant to death. Hence, the present appeal by the appellant. It was the appellant's contention that the HCJ erred in relying on the specific conclusions of the Federal Court to conclude that the cause of death of the deceased was homicidal without considering the defence case on its merits.

**Held (allowing appeal; setting aside conviction and sentence; acquitting and discharging appellant)**
**Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:**

**(1)** The HCJ had unnecessarily constrained herself to the findings of the Federal Court and in fact may not have had a proper appreciation of such findings. As a consequence, the HCJ may have misdirected herself in this regard as the finding of the Federal Court on the death being a homicide was conditional on there being no contradictory evidence. (para 30)

**(2)** It is the duty of the trial court to consider if the defence had rebutted the findings of *mens rea* as determined by the Federal Court. By feeling compelled to follow the Federal Court's *prima facie* conclusions, the trial court had failed to adequately consider the defence and as a consequence seriously prejudiced the integrity of the trial process. This misdirection led to a denial of a fair trial for the appellant. (para 32)

**(3)** DW4 is a highly qualified and competent senior consultant forensic pathologist. He had on numerous occasions given evidence on behalf of the prosecution which evidence has always been accepted. It was therefore unfortunate for the HCJ to observe that DW4 was on a fault-finding mission when even the prosecution did not challenge DW4's professionalism. Although DW4 did not have the advantage of conducting the post-mortem, he was nevertheless more qualified and experienced in asphyxia cases than PW5 who quite candidly admitted to his lack of experience in such cases. These factors ought to have alerted the trial judge that DW4 could provide the necessary assistance to the court to arrive at the truth. DW4 gave various cogent reasons as to why the death of the deceased was an accident due to positional asphyxia. (paras 47-49)

**(4)** DW4's opinion stood up to scrutiny better than SP5 as it was based on scientific grounds and not assumption. SP5's finding of smothering and pressure on the neck was based purely on the background information and not on some scientific finding. DW4's opinion was also consistent with the rest of the evidence particularly the evidence that the deceased was found sitting at the side of the bed with her head facing down. With this finding, there was at least a serious doubt as to whether the death of the deceased was homicidal. (para 60)

**(5)** The HCJ did not carry out a minute examination of the circumstantial evidence. The HCJ appeared to be shackled by the findings of the Federal Court and dismissed the defence witnesses as either inventing evidence or being interested witnesses. This was unfortunate as even interested witnesses are entitled to credence until it is shown for good reason that their testimony ought to be disbelieved. (para 67)

**(6)** The postulation of the time of death of the deceased was inconsistent with the charge against the accused as he was not in the matrimonial home during that time. It could hardly be asserted that the circumstantial evidence adduced by the prosecution and relied upon by the HCJ pointed unerringly to the one and only conclusion or an irresistible conclusion of the guilt of the accused. Hence, appellate intervention was warranted. (paras 89 & 92)

**(7)** There was a lack of judicial appreciation of the defence case and the case as a whole resulting in a serious misdirection. Erroneous inferences were drawn from the facts by the HCJ. The conviction of the accused was not only wholly unsafe but against the weight of evidence. There was a serious doubt as to whether the death of the deceased was homicidal. The prosecution failed to prove the charge against the accused beyond reasonable doubt. (para 92)

***Bahasa Malaysia*** *Headnotes*

Tertuduh ('perayu') dipertuduh di bawah s. 302 Kanun Keseksaan kerana membunuh isterinya ('si mati'). Kes pendakwaan adalah berdasarkan keterangan ikut keadaan sepenuhnya. Mahkamah Tinggi memutuskan bahawa di akhir kes pendakwaan, pendakwaan gagal membuktikan kes *prima facie*. Oleh itu perayu dibebaskan. Rayuan pendakwaan terhadap keputusan Mahkamah Tinggi ditolak oleh Mahkamah Rayuan, bagaimanapun, Mahkamah Persekutuan membenarkan rayuan pendakwaan terhadap keputusan Mahkamah Rayuan. Mahkamah Persekutuan menerima keterangan pakar patologi forensik, PW5, bahawa si mati telah secara paksa diasfiksiakan dan punca kematian bukan tidak sengaja, bukan membunuh diri tetapi pembunuhan kejam. Mahkamah Persekutuan juga bersetuju bahawa (i) perayu adalah satu-satunya orang yang berada dengan si mati pada masa kematiannya; (ii) keterangan ikut keadaan menunjukkan bahawa hubungan perkahwinan perayu dengan si mati tidak bahagia dan bergolak, hinggakan mereka tinggal berasingan; (iii) si mati didera sebelum itu oleh perayu; dan (iv) terdapat kebarangkalian tertuduh mempunyai hubungan sulit luar perkahwinan yang menunjukkan motif untuk membunuh. Mahkamah Persekutuan membenarkan rayuan pendakwaan terhadap keputusan Mahkamah Rayuan dan memerintahkan agar pembelaan dipanggil dan agar perkara tersebut didengar di hadapan Hakim Mahkamah Tinggi yang sama

('HMT'). Semasa peringkat pembelaan, seorang perunding pakar patologi forensik ('DW4') memberi keterangan bahawa simptom dan kecederaan yang dialami oleh si mati adaah konsisten dengan asfiksia posisi dan bukan asfiksia kerana meletakkan tekanan pada leher. HMT bagaimanapun mengkritik teori pembelaan berhubung asfiksia posisi kerana tidak ditimbulkan semasa pemeriksaan balas PW5 dan memutuskan bahawa ini hanya pembelaan yang difikirkan kemudian. Oleh itu, di akhir pembelaan perayu, HMT mensabitkan dan menjatuhkan hukuman mati terhadap perayu. Maka perayu merayu. Perayu menghujahkan bahawa HMT terkhilaf kerana bergantung pada kesimpulan spesifik Mahkamah Persekutuan untuk memutuskan sebab kematian si mati adalah berkenaan pembunuhan kejam tanpa mempertimbangkan kes pembelaan atas meritnya.

**Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman; melepaskan dan membebaskan perayu)**
**Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:**

**(1)** Hakim Mahkamah Tinggi telah mengekang dirinya pada penemuan Mahkamah Persekutuan dan mungkin tidak mempertimbangkan penemuan tersebut. Akibatnya, HMT tersalah arah dalam hal ini kerana penemuan Mahkamah Persekutuan berhubung kematian itu yang merupakan pembunuhan kejam adalah dengan syarat tidak terdapat keterangan yang bertentangan.

**(2)** Adalah tanggungjawab mahkamah perbicaraan untuk mempertimbangkan sama ada pihak pembelaan telah mengakas dapatan *mens rea* seperti yang ditentukan oleh Mahkaman Persekutuan. Dengan merasa adalah wajib untuk mengikuti dapatan *prima facie* Mahkamah Persekutuan, mahkamah bicara gagal mempertimbangkan pembelaan dan akibatnya telah memprejudiskan integriti perjalanan proses perbicaraan. Salah arah ini telah mengakibatkan penafian perbicaraan yang adil untuk perayu.

**(3)** DW4 ialah pakar perunding kanan patologi forensik yang berkelayakan tinggi dan kompeten. Dia telah beberapa kali memberi keterangan bagi pihak pendakwaan dan keterangannya sentiasa diterima. Oleh kerana itu, malang bagi hakim bicara untuk memerhatikan bahawa DW4 adalah dalam misi mencari kesalahan sedangkan pihak pendakwaan tidak mencabar profesionalisme DW4. Walaupun DW4 tidak mempunyai kelebihan menjalankan bedah siasat, namun begitu DW4 lebih berkelayakan dan berpengalaman dalam kes-kes asfiksia berbanding PW5 yang mengaku mempunyai kurang pengalaman dalam kes-kes sebegini. Jelas DW4 memberi pelbagai sebab meyakinkan berhubung kenapa kematian si mati adalah suatu kemalangan akibat asfiksia posisi.

**(4)** Pendapat DW4 terbuka untuk diteliti berbanding SP5 kerana berdasarkan alasan saintifik dan bukan andaian. Penemuan SP5 berhubung tekanan pada leher adalah berdasarkan semata-mata pada maklumat latar belakang dan bukan penemuan saintifik. Pendapat DW4 juga konsisten dengan keterangan lain terutamanya keterangan yang si mati didapati duduk di tepi katil dengan kepalanya mengadap ke bawah. Dengan penemuan ini, sekurang-kurangnya terdapat keraguan serius berhubung sama ada kematian si mati adalah pembunuhan kejam.

**(5)** Hakim Mahkamah Tinggi tidak menjalankan pemeriksaan terperinci berhubung keterangan mengikut keadaan. Hakim Mahkamah Tinggi kelihatan tergugat dengan penemuan Mahkamah Persekutuan dan menolak pembelaan saksi-saksi sebagai sama ada mereka keterangan atau merupakan saksi-saksi berkepentingan. Ini agak malang kerana saksi-saksi berkepentingan juga berhak dipercayai sehingga ditunjukkan sebab kukuh yang keterangan mereka tidak patut dipercayai.

**(6)** Masa yang dipostulatkan berhubung kematian si mati adalah tidak konsisten dengan pertuduhan terhadap tertuduh kerana dia tidak berada di rumah kelamin pada masa itu. Tidak boleh dihujahkan bahawa keterangan ikut keadaan yang dikemukakan oleh pendakwaan dan disandar oleh hakim tanpa ragu-ragu hanya menjurus pada menunjukkan satu kesimpulan atau kesimpulan yang tidak boleh disangkal tentang kebersalahan tertuduh. Oleh itu, campur tangan rayuan adalah wajar.

**(7)** Wujud kekurangan pemahaman kehakiman berhubung kes pembelaan dan kes tersebut secara keseluruhan mengakibatkan salah arah yang serius. Inferens yang salah dibuat berdasarkan fakta oleh hakim bicara. Sabitan tertuduh bukan sahaja tidak selamat tetapi bertentangan dengan beban keterangan. Terdapat keraguan serius berhubung sama ada kematian si mati adalah akibat pembunuhan. Pendakwaan gagal membuktikan pertuduhan terhadap tertuduh melampaui keraguan munasabah.

**Case(s) referred to:**

*Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC* ***(refd)***
*Chan Chwen Kong v. PP [1962] 1 LNS 22 CA* ***(refd)***
*Chan King Yu v. PP [2009] 1 CLJ 601 FC* ***(refd)***
*Chang Kim Siong v. PP [1967] 1 LNS 18 FC* ***(refd)***
*Chin Kek Shen v. PP [2013] 7 CLJ 435 CA* ***(refd)***
*Collector Of Land Revenue v. Alagappa Chettiar And Collector Of Land Revenue v. Ong Thye Eng And Cross Appeals [1968] 1 LNS 31 PC* ***(refd)***
*Dewi Nadia Alias v. PP [2015] 3 CLJ 577 CA* ***(refd)***
*Edy S v. PP [2013] 9 CLJ 48 CA* ***(refd)***
*Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982] CLJ (Rep) 130 FC* ***(refd)***
*Karam Singh v. PP [1967] 1 LNS 65 FC* ***(refd)***
*Omar Shaari v. PP [2013] 1 LNS 488 CA* ***(refd)***

*Piara Singh and Ors v. State of Punjab 1977 AIR 2274* ***(refd)***
*PP v. Jitweer Singh Ojagar Singh [2012] 3 CLJ 983 HC* ***(refd)***
*PP v. Magendran Mohan [2005] 3 CLJ 592 HC* ***(refd)***
*Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC* ***(refd)***
*Singapore Finance Ltd v. Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party) [1984] 1 LNS 3 HC* ***(refd)***
*Sunny Ang v. PP [1965] 1 LNS 171 FC* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 425
Penal Code, s. 302

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*[Editor's note: For the High Court judgment, please see Jitweer Singh Ojagar Singh v. PP [2014] 1 LNS 1676 (overruled).]*

*Reported by Sandra Gabriel*

## JUDGMENT

**Harmindar Singh Dhaliwal JCA:**

**[1]** In the early hours of the morning of 22 October 2007, a woman was found dead in her bedroom. Her name was Shentho Kaur a/p S Jaswant Singh ("deceased"). She was 46 years old. She was found dead by her husband, the appellant in this appeal ("accused").

**[2]** Subsequently, after police investigations, the accused was charged under s. 302 of the Penal Code for the murder of his wife, Shentho Kaur a/p S Jaswant Singh at their matrimonial home, No. 27, Jalan 2/3, Bandar Country Homes, Rawang in the District of Gombak, Selangor Darul Ehsan on 22 October 2007 between 7am until 8.10am. The charge against the accused was as follows:

> Bahawa kamu, pada 22 Oktober 2007 jam di antara 7.00 pagi hingga jam 8.10 minit pagi, bertempat di No. 27, Jalan 2/3, Bandar Country Homes, Rawang di dalam Daerah Gombak di dalam Negeri Selangor Darul Ehsan, telah melakukan kesalahan membunuh iaitu menyebabkan kematian ke atas Shentho Kaur a/p S Jaswant Singh (KPT No: 610530-01-5532) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

**Chronology**

**[3]** At the trial, 21 witnesses were called by the prosecution to prove the charge against the accused. On 30 August 2010, after hearing the evidence of these 21 witnesses and the submissions by both learned counsel for the appellant as well as the learned Deputy Public Prosecutor (DPP), the High

Court ruled at the end of the prosecution's case that the prosecution has failed to prove a *prima facie* case against the accused and the accused was acquitted and discharged of the charge against him. The full facts of this case and the reasons for the said judgment can be found in *PP v. Jitweer Singh Ojagar Singh* [2012] 3 CLJ 983 at p. 1015.

**[4]** The Public Prosecutor being dissatisfied with the said decision appealed to this court against the whole of the decision. This court dismissed the appeal and affirmed the findings of the learned Judicial Commissioner (JC) of the High Court.

**[5]** Dissatisfied with the decision of this court the prosecution once again filed an appeal to the Federal Court. The appeal was heard by the Federal Court on 5 August 2013. The appeal of the Public Prosecutor was allowed. The Federal Court ordered for the defence to be entered by the accused and for the matter to be heard before the same judge.

**[6]** Back in the High Court, after hearing the evidence of six witnesses for the appellant, it was decided by the learned judge (previously JC) at the end of the defence case that the accused was guilty as charged. He was convicted and sentenced to death. Hence the present appeal by the accused against both the conviction as well as the sentence by the High Court. Having read the written submissions and hearing oral arguments on 10 December 2015, 15 January 2016 and 18 March 2016, we reserved judgment to a date to be fixed. We have now come to a decision. Our decision is as follows.

**The Case For The Prosecution**

**[7]** The case for the prosecution was entirely circumstantial. No one saw the accused kill his wife. This by itself is not unusual. Crimes are usually committed when no one is around. The plan is not to get caught.

**[8]** The law allows for a conviction based purely on circumstantial evidence. The principles governing the acceptance of circumstantial evidence to convict an accused have been laid down in numerous cases (see *Sunny Ang v. PP* [1965] 1 LNS 171; [1966] 2 MLJ 195; *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982] CLJ (Rep) 130; [1982] 2 MLJ 306; *PP v. Magendran Mohan* [2005] 3 CLJ 592; *Chan Chwen Kong v. PP* [1962] 1 LNS 22; [1962] MLJ 307; *Karam Singh v. PP* [1967] 1 LNS 65; [1967] 2 MLJ 25; *Chang Kim Siong v. PP* [1967] 1 LNS 18; [1968] 1 MLJ 36).

**[9]** The principle gleaned from these authorities is that a conviction based on circumstantial evidence was good in law if the cumulative effect of all the evidence leads to an irresistible conclusion that it was the accused who committed the crime with no other reasonably possible explanation. Put another way, the evidence must be inconsistent with any other hypothesis than that of the guilt of the accused. The circumstances relied on must be fully established. If any of the circumstances proved in a case are consistent with the innocence of the accused or the chain of the continuity of the

circumstances is broken, the accused is entitled to the benefit of the doubt. In other words, there must be a chain so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused.

**[10]** In the instant case, the prosecution relied on the evidence of the pathologist, Dr Shahidan bin Md Noor (PW5), forensic pathologist attached to Hospital Sungai Buloh, to establish that the cause of death was asphyxia most likely due to smothering or pressure on the neck due to broad or soft ligature. In this regard, the Federal Court did not agree with the findings of the High Court that there was no conclusive finding by the pathologist on the cause of death. The Federal Court accepted that the deceased had been forcibly asphyxiated and that the cause of death was not accidental, not suicidal but homicidal. Apart from this, the other important evidence as accepted by the Federal Court in holding that a *prima facie* case had been made out was that the accused was the only person with the deceased at the time of her death.

**[11]** The Federal Court was no doubt influenced by the circumstantial evidence adduced to show that it was the accused who caused her death, namely, that the accused's marital relationship with the deceased was an unhappy and turbulent one such that they were living apart; that the deceased had been subjected to prior abuse by the accused; that there was a probability of the accused having an extramarital affair indicating a motive to kill; that the accused did not appear to be a grieving husband; that the accused had delayed giving his consent for the post-mortem; that the accused was not involved in making the funeral arrangements of the deceased; that the accused did not attend the cremation of the deceased; and the accused, together with his driver and housekeeper, were busy removing things from the house soon after the deceased had died whilst funeral arrangements were being made by family members.

**[12]** These were essentially the reasons relied upon by the Federal Court in ordering for the defence to be called. The Federal Court held that the circumstantial evidence gave rise to the one and only logical inference that it was the accused and the accused alone who caused the death of the deceased.

**Case For The Defence**

**[13]** The defence called six witnesses. The accused was the first defence witness. The other witnesses were the accused's younger sister (DW2), his cousin (DW3), the pathologist (DW4), his brother-in-law (DW5) and his neighbour and friend of the deceased (DW6).

**[14]** In a nutshell, it was the defence case that the accused did not kill his wife. It was asserted that he was not present at the scene at the deceased's time of death. The defence case was that the accused reached the matrimonial

home approximately at 6.33am on 22 October 2007. Upon reaching the home, he called his driver, Khairuddin, to open the door for him. The moment the accused stepped into the said house, he gave directions to the driver to clean up the house and wash the dishes.

**[15]** The accused then proceeded to the first floor of the house. At the first floor, the accused found things scattered all over the place so he decided to sweep the floor and clear the mess. At the same time, he sent the driver to buy some breakfast.

**[16]** After cleaning the first floor of the said house, the accused proceeded to the third floor of the house to check on things there. On reaching the third floor, the accused saw the deceased sitting at the edge of the bed in a slumped position. The accused approached the deceased and tapped the deceased on her back. However, there was no response.

**[17]** The accused saw froth in the deceased's mouth and her eyes were fixed and dilated. The accused quickly laid the deceased on the bed and performed CPR to resuscitate her but failed. The whole room smelled of urine and vomit. On realising that the deceased was dead, the accused cried. He immediately summoned the driver, who was out to buy breakfast, to come back.

**[18]** When the driver came back to the said house, both the accused and the driver carried the deceased from the room at the third floor to the accused's room at the second floor, as that room was a cleaner and tidier room.

**[19]** When the accused's brother, Kuldip Singh (PW2), came to the house in the morning of 22 October 2007, he (PW2) was advised by one Dr Gurmit Singh (not called as a witness) to make a police report. Upon reaching the police station, PW2 was informed that proof of identification of the deceased was required before any such police report can be taken. PW2 later went back to the house and came back with the deceased's bank book as proof of identification. The police report was taken and a burial certificate was also issued.

**[20]** After the burial permit had been obtained, the accused waited for the deceased's close relatives to arrive at the house. When the deceased's brother, one Dr Gurdial Singh (PW4) came to the house in the evening and held discussions, the accused agreed for a post-mortem to be conducted to ascertain the cause of death of the deceased. A second police report was made by PW2 for this purpose. A post-mortem was then conducted by the Sungai Buloh Hospital. After the post-mortem, the body of the deceased was released to the family members for the funeral rites. On 23 October 2007, the police arrested the accused, DW3, the driver, and the maid.

**[21]** To recap, the prosecution had relied on the pathologist (PW5) to prove that the deceased died due to "smothering pressure on the neck due to broad or soft ligature". During the defence stage, an expert witness in the person of Dato' Dr Bhupinder Singh (DW4), forensic consultant pathologist attached to Hospital Pulau Pinang, was called to review and to form a second opinion of PW5's report (exh. P6). According to DW4's second opinion report (exh. D65) the symptoms and injuries sustained by the deceased were consistent with positional asphyxia. DW4 opined that the cause of death was positional asphyxia and not asphyxia because of smothering pressure on the neck due to broad or soft ligature as per PW5's evidence.

**Findings Of The High Court**

**[22]** The learned trial judge noted that the accused had presented a diametrically opposite version of how the deceased had succumbed to her death. The accused had denied any involvement with the crime he was charged with. In particular, the learned judge noted that the defence had challenged the findings of the pathologist PW5 by calling their own expert witness DW4. The learned judge appeared to criticise the defence theory of positional asphyxia as it was not raised during cross-examination of PW5. The learned judge accepted the proposition that this "positional asphyxia theory was an afterthought defence introduced by the defence denying the prosecution the right to rebut it at the earliest possible opportunity".

**[23]** In the premises, the learned judge came to the following finding:

> Based on the above high authorities, it is not opened (sic) to the defence to introduce the evidence of DW4 during the defence stage having opted to abandon it during the prosecution's case. If the defence was suggesting that SP5 was not speaking the truth, the defence ought to have put to SP5 during cross-examination some questions showing that imputation is intended to be made, and not leave it unchallenged at that stage but when he is caught in a situation he is not able to get out of it then to put the blame on that party for its failure to address the point. In view of the above, it is my finding that this Court ought not to consider the findings of DW4. Hence, I would dismiss this argument for the reason that this is an afterthought defence.

**[24]** Nevertheless, the learned judge went on to consider the evidence of DW4 "for the sake of completeness". The learned judge noted DW4's evidence that positional asphyxia happens when "… the victim's body assumes an abnormal position compromising the process of respiration causing mechanical interference with pulmonary ventilation. The diagnosis is usually based on circumstantial evidence in conjunction with excluding other significant underlying causes of death."

**[25]** The learned judge also noted the criterion necessary for diagnosis of positional asphyxia as related by DW4:

(a) The body position must obstruct normal gas exchange;

A (b) It must be impossible to move to another position; and

(c) Other causes of natural or violent death must be excluded.

**[26]** DW4 also opined that in cases of positional asphyxia, the victim must be either in a semi-conscious or unconscious state. This type of case is normally seen in alcoholics, patients in stupor or intoxication from drugs and B even epilepsy. This dangerous situation arises when that person is unable to extricate himself or herself from that position especially when there is a loss of consciousness or sedation.

**[27]** The learned judge noted that she had to contend with two divergent C findings by experts with regard to the cause of death of the deceased. The learned judge appeared not to accept the evidence of DW4 as going by the chemist report as prepared by PW8, the deceased could not be in a semi-conscious or conscious state as there was no significant level of alcohol detected in the blood sample taken from the deceased and there were only traces of diazepam in the blood. The learned judge discounted the evidence D of DW4 as the pathologist did not have the benefit of conducting a physical examination of the deceased. Besides, PW5 noted some injuries found on the deceased although she accepted that DW4 maintained that these features were due to positional asphyxia and not blunt trauma.

E **[28]** The learned judge also discounted the evidence of the other defence witnesses as being interested witnesses as well as for other reasons which are set out in the judgment. The learned judge then ruled that the "defence had not discharged the evidentiary burden placed on it to raise reasonable doubts in the prosecution's case". The accused was accordingly found guilty, convicted and sentenced to death. F

**Our Decision**

**[29]** Before us, learned counsel for the accused put forward serious criticism as to the manner in which the learned trial judge had evaluated the evidence. At the outset, it was asserted by learned counsel that the learned G judge erred in relying on the specific conclusions of the Federal Court to conclude that the cause of death of the deceased was homicidal without considering the defence case on its merits. The learned judge appeared to take the position that the evidence of PW5 cannot be reconsidered as the Federal Court was satisfied beyond all reasonable doubt that the cause of death was H not accidental, not suicidal but homicidal.

**[30]** In this connection, we find the criticism to be legitimate as the learned judge appeared to have unnecessarily constrained herself to the findings of the Federal Court and in fact may not have had a proper appreciation of such findings. As a consequence, the learned judge may have misdirected herself I in this regard as the finding of the Federal Court on the death being a

homicide was conditional on there being no contradictory evidence. Specifically, in speaking for the Federal Court, Jeffrey Tan FCJ stated prior to the conclusion:

> Without the evidence to contradict it, the trial court should have accepted the conclusion of the pathologist and not rejected it." (*PP v. Jitweer Singh Ojagar Singh* [2014] 1 CLJ 433 at p. 454)

**[31]** We should also add that the Federal Court was only tasked with determining whether a *prima facie* case had been established against the accused on the charge of murder. In this regard, the Federal Court was satisfied that the ingredients of the charge had been made out beyond all reasonable doubt. This was a purely *prima facie* finding at the end of the prosecution case and as the Federal Court had also pointed out, such a *prima facie* case would warrant conviction if the accused elected to remain silent.

**[32]** As it turned out, the accused did not remain silent and instead called six witnesses including himself and the pathologist DW4. In the circumstances, it was the duty of the trial court to consider if the defence had rebutted the findings of *mens rea* as determined by the Federal Court instead of staying steadfast, as it seemed, to the Federal Court's conclusions. By feeling compelled to follow the Federal Court's *prima facie* conclusions as we would put it, the trial court had failed to adequately consider the defence and as a consequence seriously prejudiced the integrity of the trial process. In effect, it would not be too far-fetched to assert that this misdirection led to a denial of a fair trial as rightly submitted by learned counsel for the accused.

**[33]** Be that as it may, it is our view that this by itself is insufficient to warrant an acquittal as the appellate court is also in a position to determine if the defence evidence had raised a reasonable doubt on the prosecution case.

**[34]** Now the learned judge also faced criticism in refusing to consider the evidence of DW4 for the reason that this was an afterthought defence. The learned judge took a firm position that she could not consider this defence of positional asphyxia as it was not put forward to the prosecution witnesses especially the pathologist PW5. Again we find that this criticism is not without merit.

**[35]** In this regard, we only need to refer to the salutary remarks by the Federal Court in *Alcontara Ambros Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209 where Edgar Joseph Jr FCJ observed (at p. 718 (CLJ); p. 218 (MLJ)):

> Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention - in other words, 'kept up its sleeve', as it were - and revealed for the first

A time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

B At this stage, we would interpolate to remark - though we are digressing somewhat from the point concerning the onus of proof - that the judge went so far as to hold 'that the defence by its failure so to put such questions to the prosecution witnesses ought not to be allowed to raise such issues at the defence stage'. In this, the learned Judge was clearly wrong, since it is settled law that, although a court may view with C suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

D **[36]** In any event, it was not the case that the defence was keeping this defence of positional asphyxia up its sleeve. For whatever reasons, the defence only obtained the evidence of DW4 after the Federal Court decision. It may well be that the defence was confident that the inconclusive nature of PW5's findings in the post-mortem fell far short of proving that the death E of the deceased was homicidal. After all, the accused was successful in persuading the trial court initially and this court as well. So in essence there was nothing to put to the relevant prosecution witnesses.

**[37]** There is also a difference in the instant case as the defence of positional asphyxia was in effect opinion evidence rather than evidence of facts within F the knowledge of the accused. There was no suggestion at all that PW5 was lying. The contention was that PW5's opinion ought not to be accepted for the reasons canvassed. In the circumstances, it would be harsh to criticise the positional asphyxia defence as a recent invention especially as it comes from an independent expert witness and not the accused or his other witnesses of fact.

G

**[38]** Additionally, we find that there was no prejudice to the prosecution as PW5 was present in court at the request of the learned DPP when DW4 was giving evidence. If there were any issues with DW4's evidence, the prosecution could have applied to recall PW5 to rebut the evidence of DW4. H The application could have been made under s. 425 of the Criminal Procedure Code and in order to ensure a just decision of the case the court would be duty bound to allow it (*Ramli Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243; [1986] 2 MLJ 33; *Chin Kek Shen v. PP* [2013] 7 CLJ 435). For some inexplicable reason, the prosecution did not do so. In the interest I of justice and to get at the truth, the trial court could also have exercised its discretionary power under the same provision to recall PW5. This would be in accordance with the primary function of a trial court - to ensure a fair trial.

So the criticism that the defence of positional asphyxia is an afterthought and cannot be considered is, with respect, without basis and patently unfair to the accused.

**[39]** Although the learned judge refused to consider the evidence of DW4, Her Ladyship nevertheless went on to evaluate the evidence of DW4 "for the sake of completeness". At the end of her analysis of DW4's evidence, the learned judge appeared to reject his evidence mainly on the basis that PW5's evidence ought to be accepted as he was the one who did the post-mortem and not DW4. Can the learned judge's finding in this regard be sustained?

**[40]** It should be recalled that after the prosecution had closed its case, the learned judge had acquitted the accused ostensibly for the reason that the cause of death of the deceased remained unproved as PW5 could not positively conclude that the deceased died because of "smothering or pressure on the neck due to broad or soft ligature due to lack of background information". The learned judge was left in doubt as to how the deceased had succumbed to her death. This court agreed with those findings. The Federal Court however found that there was no suggestion that the injuries on the deceased were self-inflicted and/or the deceased could have died of natural causes. The Federal Court determined that the pathologist had made a conclusive finding that the deceased was forcibly asphyxiated and in the absence of contradictory evidence, the trial judge ought to have accepted the conclusion of the pathologist.

**[41]** It follows therefore that the major issue here which goes directly to the core of the charge made against the accused is PW5's finding that the cause of death was most likely smothering or pressure on the neck due to broad or soft ligature. The defence pathologist DW4 contested this finding and testified that PW5's conclusion was based on assumption rather than on any scientific basis. DW4 opined that instead of being forcibly asphyxiated, the deceased's cause of death was accidental due to positional asphyxia.

**[42]** Learned counsel for the accused submitted that the trial judge had failed to undertake a critical analysis of the evidence given by DW4 and instead decided to give credence to the opinion advanced by PW5. This raises the question - when faced with conflicting expert opinion, on what basis should the court decide which opinion to accept.

**[43]** It is trite law that a judge must not consider expert evidence in a vacuum in the sense that the same should not be artificially separated from the rest of the evidence. When there is conflicting expert opinion, a judge should test it against the background of all the other evidence available in that particular case in order to decide which expert evidence is to be preferred. In particular, a judge must have regard to the direct evidence, whether in the form of oral evidence or contemporaneous documents, and the overall circumstances material to the issue at hand. The version more consistent with these ought to be accepted as being more trustworthy and reliable.

**[44]** The Supreme Court of India in *Piara Singh and Ors v. State of Punjab* 1977 AIR 2274 laid down the approach to be adopted when the opinion of one expert differs from another as follows:

> What has happened is that two experts, namely, Dr Jatinder Singh and Dr Paramjit Singh had differed in their opinions. The High Court rightly observed that in view, of the difference of opinion between the two experts the evidence of Dr Jatinder Singh must be preferred as it is supported by the evidence of the eye-witnesses whose evidence is both reliable and trustworthy and is also supported by other circumstances proved in the case. It seems to us that where there is a conflict between the opinion of two experts the Court should normally accept the evidence of the expert whose evidence is corroborated by direct evidence of the case which according to the Court is reliable

**[45]** It is also trite that a trial judge should not be quick to reject evidence of an expert whose findings are based on reports of facts unless the judge is satisfied that the inference or opinion derived from the said reports of facts is unsound. In evaluating the conflicting experts' evidence the approach ought to be to examine the scientific grounds and bases on which they rely (*Singapore Finance Ltd v. Lim Kah Ngam (S'pore) Pte Ltd & Eugene HL Chan Associates (Third Party)* [1984] 1 LNS 3; [1984] 2 MLJ 202).

**[46]** On appellate intervention with regard to expert evidence, in *Collector Of Land Revenue v. Alagappa Chettiar And Collector Of Land Revenue v. Ong Thye Eng And Cross Appeals* [1968] 1 LNS 31; [1971] 1 MLJ 43, the Privy Council held (per Lord Diplock) at p. 46:

> A finding that the opinion of one expert witness is to be preferred to that of another, is also one which is not lightly to be disturbed by an appellate court unless it can be demonstrated that the judge who heard and saw them give their evidence has misunderstood it or that his reasons for preferring one to the other are clearly unsound.

**[47]** Turning now to the evidence of DW4, as we are compelled to do, we note at the outset that DW4 is a highly qualified and competent senior consultant forensic pathologist who was then attached to the Department of Forensic Medicine, Hospital Pulau Pinang. He has on numerous occasions given evidence on behalf of the prosecution which evidence has always been accepted. It was therefore unfortunate for the learned trial judge to observe that DW4 was on a fault-finding mission when even the prosecution did not challenge DW4's professionalism.

**[48]** Although DW4 did not have the advantage of conducting the post-mortem, he was nevertheless more qualified and experienced in asphyxia cases than PW5 who quite candidly admitted to his lack of experience in such cases. These factors ought to have alerted the learned trial judge that DW4 could provide the necessary assistance to the court to arrive at the truth.

**[49]** Clearly DW4 gave various cogent reasons as to why the death of the deceased was an accident due to positional asphyxia. These reasons can be summarised as follows:

(a) The presence of ecchymosis on the upper part of the body, the upper limbs, the scapula region and upper back. This would indicate that the deceased was bent at the waist with her face down. The ecchymosis present in the upper chest, upper back, shoulders and upper arm according to DW4 are not part of asphyxia.

(b) Respiration is compromised due to the deceased being in a restrictive position of the body producing hyperflexion of the head (head flexed down) and neck. Since the deceased was obese and in a prolonged sitting position, there was pressure on the abdomen over the diaphragm and this could impede respiration.

(c) Skin slip under the neck could be caused by decomposition changes or from the deceased having her head bent in a slump position for a prolonged period of time.

(d) Death of the deceased could not be due to smothering or pressure on the neck. Death could not be due to smothering as there were no injuries to the facial region. There were no injuries over the mouth, the lips, the nose and lower in the face. Death could not be due to pressure on the neck as there were no physical marks. These marks will become more prominent and not disappear within 24 hours. In cases of pressure on the neck, there would be marked haemorrhages of the soft tissues in the region of the neck which were not seen here.

(e) The deceased's blood sample showed presence of diazepam although alcohol was not seen in significant levels. Unfortunately, no quantification was done as the blood specimen sent to the chemist was insufficient for a quantitative analysis. Under the influence of the drug diazepam which acts as a sedative, hypnotic and causes central nervous system depression the deceased would have been in a stupor. If she had consumed alcohol along with diazepam a synergistic effect would have led her in a state of deep sleep leading her to a position of bending at the waist while sitting in bed and leaning over with her left hand bent. If she was an asthmatic with bronchitis the situation would be worse as she will have difficulty in breathing.

**[50]** Based on these findings DW4 concluded (in exh. D65):

> I have no doubt in my mind that this is an accidental death as a result of positional asphyxia. People may die from positional asphyxia by simply getting themselves into a breathing restricted position they cannot get out of. There [is] not a single indicator or evidence of death by smothering or pressure on the neck.

**[51]** It should be noted that the presence of diazepam in the deceased's blood was not surprising given the testimony of the neighbour DW6 who was probably among the last persons to see the deceased alive. DW6 told the court that the deceased came to her house on the night before she died and told her that she was taking sleeping tablets which she personally saw the deceased taking. The deceased told DW6 not to worry as she was a qualified nurse and knew what she was doing.

**[52]** The finding of DW4 that the deceased died due to positional asphyxia is consistent with the evidence of the s. 112 statement of Khairuddin bin Dulahari ("Khairuddin"), the driver of the accused, which statement was held by the Federal Court to be admissible. In this statement (ID63), there is a reference to the deceased being in a sitting position on her bed with her head facing down as follows:

> … Pada 22/10/07 jam l/kurang 6.30 pagi tuan call saya supaya buka pintu kerana sekejap lagi dia sampai. Selepas 3 minit kemudian tuan sampai di rumah seorang diri. Tuan telah panggil saya untuk ikut pergi ke dapur dan suruh bersih sampah di dapur dan cuci pinggan mangkuk di dapur. Saya cuci seorang diri dan tuan telah naik ke atas masuk ke biliknya. L/kurang 1/2 jam tuan panggil ke biliknya dan saya terlihat madam sedang duduk atas katil dalam keadaan kepala ke bawah. Tuan suruh saya pergi beli sarapan pagi ...

**[53]** To recap, the accused had also testified that he saw the deceased sitting at the edge of the bed in a slumped position. Seen in this new light with DW4's evidence, the finding that the accused was the last person seen alive with the deceased was in serious doubt.

**[54]** Comparing now DW4's evidence with that of PW5, it is significant to recall at the outset that PW5 by his own admission is not experienced in asphyxia cases. In his post-mortem report (exh. P6), PW5 made his findings as follows:

> CONCLUSIONS
>
> I was informed this Sikh female housewife was found dead on the bed in her house at the stated address early morning of 22nd October 2007. The death was only reported early night of the same date. Autopsy findings suggested she most likely had died of one asphyxial death. The cause of death was provisionally written as 'Pending further investigations'. Subsequently it was given as due to 'asphyxia due to most likely of smothering or pressure on the neck by soft or broad ligature' after taking into account all the available information surrounding the death.
>
> It was difficult, if not impossible to arrive at such conclusion without some background data. However the toxicological result may shed some light into the circumstance of her death. If a therapeutic substance was found and exceeded the usual level, it may and could also contribute to her death on itself.

CAUSE OF DEATH

1(a) Asphyxia (due to)

1(b) Most likely of smothering or pressure on the neck due to broad or soft ligature.

**[55]** When asked during cross-examination whether his findings were conclusive, PW5 responded as follows:

PB: I am taking you through your report. To the 2nd last paragraph. Toxic finding/referred, 3rd line, Conclusion: cause of death is asphyxia.

SP5: Yes

PB: Cause of death - "pending further investigation? You have stated the cause of death as "most likely of smothering pressure on the neck due to broad or soft ligature. Is this correct?

SP5: Yes.

PB: Those were your conclusions?

SP5: Yes.

PB: Were these findings conclusive?

SP5: For my portion it is conclusive because it is difficult to arrive at that conclusion and after taking into account the finding of asphyxia changes and not so much on the background data. I can only able to conclude that she died due to nature of the asphyxia process.

PB: Please go slowly on this finding. Were your findings conclusive?

SP5: At that point it was conclusive.

PB: "It was difficult if not impossible to arrive at such conclusion without some background data". You have this sentence? Whether that qualifies your findings?

SP5: What I am trying to say is that it is difficult to arrive at this finding. I agree with learned counsel that it is rather difficult to arrive at this conclusion. What I am trying to say is there were findings of asphyxia nature but I do not know what caused the asphyxia nature.

PB: Why did you say it is difficult if not impossible to arrive at such conclusion without the background data? Is it because the background data was lacking?

SP5: Yes.

PB: Would you now agree that your findings were not conclusive? From what you said?

SP5: I agree. That was why I have stated in the report the cause of death was "most likely of smothering … soft ligature."

**[56]** Later during re-examination, PW5 further explained his findings in the following fashion:

> TPR: Apakah yang doctor maksudkan dengan laporan post mortem doctor di perenggan E9 iaitu "It was difficult if not impossible to arrive at conclusion without some background data".
>
> SP5: Sebenarnya penemuan mati disebabkan oleh asphyxia adalah sesuatu yang sukar untuk diberikan sebab kematian. Kalau seseorang itu ada menunjukkan itu sahaja syak kita itu mesti tinggi untuk menyatakan kematian asphyxia jadi kita hendak conclude adalah sukar tanpa background data dan kita pun tidak confident untuk sampai ke conclusion itu. Dari pengalaman saya sendiri kes-kes yang melibatkan mati disebabkan oleh asphyxia bila mana leher ditekan samada dicekik dengan tangan atau tali atau dismother tanda-tanda asphyxia itu ada tapi background itu tidak ada tidak berani kita hendak bagi.
>
> Tetapi kalau background tidak ada saya tidak berani untuk beri sebab kematian oleh sebab asphyxia jadi kalau ada tanda-tanda asphyxia kalau tidak ada latar belakang tak berani nak buat keputusan asphyxia sebab tanda-tanda asphyxia itu transient dan tanda-tanda ini akan hilang. Jadi tidak berani hendak beri sebab kematian.
>
> Berdasarkan pengalaman saya yang sedikit tentang asphyxia sebab kematian yang disebabkan oleh asphyxia ini saya perlu berhati-hati. Sebab itulah dalam conclusion saya, saya menyatakan kemungkinan besar dia mungkin ditekup hidung dia atau bahagian leher dengan sesuatu yang lembut.

**[57]** From the evidence just alluded to, it would appear that there was at least some uncertainty as to the cause of death in PW5's findings. Initially, he made a preliminary finding of asphyxia death but the cause of death was provisionally written as "pending further investigations". Based on the autopsy findings itself he was unsure as to what caused the asphyxia. He was candid enough to say that because of his limited experience in asphyxia cases he had to be very careful about his conclusions on the cause of death.

**[58]** It was only when he obtained information surrounding the death of the deceased that he came to the conclusion that the cause of death was "asphyxia due to most likely of smothering or pressure on the neck by soft or broad ligature". He admitted that it was impossible to arrive at the conclusion without the background data.

**[59]** It is particularly noteworthy that PW5 does not explain if his finding of smothering or pressure on the neck is consistent with the results of the autopsy. In other words, what exactly in the autopsy shows evidence of smothering or pressure on the neck. If there was any such evidence, PW5 would have been able to say so, as DW4 had done, without having to look to the background information. In the circumstances, we find ourselves in agreement with DW4's observation that PW5's finding was based on assumption rather than any scientific approach.

**[60]** As mentioned earlier, it is trite law that the courts would look to the scientific grounds relied upon by the experts and also to see if the conclusions are consistent with the overall circumstances of the case. In the instant case, we are constrained to hold that DW4's opinion stands up to scrutiny better than SP5 as it is based on scientific grounds and not assumption. SP5's finding of smothering and pressure on the neck is based purely on the background information and not on some scientific finding. DW4's opinion is also consistent with the rest of the evidence particularly the evidence that the deceased was found sitting at the side of the bed with her head facing down. With this finding, there is at least a serious doubt as to whether the death of the deceased was homicidal.

**[61]** We would also observe as we had alluded to earlier, if the prosecution had issues with DW4's evidence, they could easily have recalled PW5 to rebut DW4's evidence. As PW5 was present in court, the learned DPP would surely have been appraised of the veracity of DW4's finding by PW5. However, the prosecution chose not to do so and therefore assumed the risk that DW4's evidence remained unchallenged by rebuttal evidence.

**[62]** We also observe that if indeed there was a case of smothering or pressure on the neck, the police could have done more by looking for the incriminating items in the bedroom and in the house. As it turned out, the chemist report (exh. P27) prepared by PW8 disclosed that no male DNA profile was developed from the nail clippings obtained from the deceased. In other words, there is no DNA evidence incriminating the accused. This appears to have been overlooked by the trial judge. The presence or absence of DNA evidence to link an accused person with the alleged crime committed is certainly an important factor in determining the guilt or innocence of an accused (*Omar Shaari v. PP* [2013] 1 LNS 488; [2014] 2 MLJ 586; *Edy S v. PP* [2013] 9 CLJ 48).

**[63]** There was also some suggestion of injuries sustained by the deceased allegedly during the time of her death. The evidence of both the pathologists indicates that these injuries found on the deceased were sustained prior to her death. It was significant that even PW5 testified that the said injuries were past injuries which could have occurred about three days before her death. This was corroborated to a large extent by the evidence of DW4.

**[64]** These findings were also consistent with the testimony of the accused who said that these injuries to her head and her wrist could have occurred when the deceased fell in her bathroom on 18 October 2007. The head injuries were confirmed by PW5 to have occurred before her death. If that was not the case, PW5 would have had to consider whether the death was caused by those head injuries which he had already discounted as not related to her death. In this regard, DW4 had also testified that if there was any blunt trauma to the head, the bleeding could be severe and this could be given as the cause of death.

**[65]** As for the wrist injury, DW6, the deceased's neighbour and a friend whom the deceased confided in, told the court that the deceased had told her the night before her death that she had a fall and had hurt her wrist. The cumulative effect of the evidence as aforementioned at least raises a serious doubt as to whether the so-called "multiple injuries" were indicative of a homicide.

**[66]** We now come to the circumstantial evidence that was taken into account by the trial judge which circumstantial evidence it was found, led to the irresistible conclusion that the accused had committed the crime as charged. We must consider, as it is indeed our duty, and was the duty of the trial judge, if the entirety of the evidence adduced discloses some other reasonable interpretation of the circumstantial evidence. As is the accepted law, the burden on the accused is not to conclusively prove his innocence but only to raise a reasonable doubt on the case for the prosecution.

**[67]** Unfortunately, the learned trial judge did not carry out a minute examination of the circumstantial evidence as relied upon by the prosecution. Her Ladyship appeared to be shackled by the findings of the Federal Court and dismissed the defence witnesses as either inventing evidence or being interested witnesses. This is unfortunate as even interested witnesses are entitled to credence until it is shown for good reason that their testimony ought to be disbelieved. This is borne out more of common sense as otherwise all evidence of family members or friends is liable to be excluded purely on the account of them being so.

**[68]** The fallacy of this approach can be seen in that family members of the deceased would also be deemed to be interested witnesses as they would have an axe to grind with the deceased. In the premises, it would be a far safer and more reliable approach to consider the evidence of all so-called interested witnesses on the merits rather than discount their testimony purely on the label of them being interested witnesses.

**[69]** Dealing now with some of the pertinent testimony setting out the circumstantial evidence, we begin with the testimony of PW3, Dr Paranjit Kaur, who was a medical doctor and the deceased's sister-in-law. PW3 had testified that she heard a voice message on her mobile phone in which the deceased was telling someone else that she had broken her arm and wanted to make a police report. PW3's testimony was as follows (where TPR refers to the DPP and SP3 is PW3):

> SP3: I received a telephone call at about 9.15 at night from the deceased. The deceased is Shento.
>
> TPR: What is the call all about?
>
> SP3: I actually did not speak to her, because it was a missed call. I was attending to a patient.
>
> TPR: After you noticed the missed call what did you do next?

SP3: I tried to call her back several times but there was no answer. On and off I tried to call her about two hours.

TPR: After failing to call her what did you do?

SP3: Then I realized there was a voice message on my phone, which was not for me to listen but a conversation between two people that got recorded on my phone.

TPR: What did you listen from the voice message?

SP3: I heard the voice of the deceased Shento Kaur to another person saying she has broken her arm and she wants to make a police report.

**[70]** Initially this evidence of the voice message was ruled by the High Court to be inadmissible on account of it being hearsay evidence. The Federal Court ruled the evidence of the voice message was admissible as the object was only to prove the fact of the voice message.

**[71]** Now, with respect, if the objective of the voice message was merely to prove the fact of the voice message and not the truth of its contents, such evidence is useless and of no relevance to the facts in issue. Merely proving that a conversation between the deceased and an unknown person was recorded in PW3's phone does not advance the prosecution's case one jot. If for example, the issue was whether the deceased was deaf and mute, the fact of the voice message would be admissible to prove or disprove this. We note also that the primary evidence of the message was not produced as the police through the evidence of PW16 could not retrieve any such message from PW3's phone. It was therefore wholly unsafe for the learned trial judge to have accepted the truth of the voice message when Her Ladyship commented:

> ... How does one explain the voice mail heard by SP-3 of the deceased telling someone, her hand was injured and she wanted to lodge a police report.

**[72]** Even so, the voice message does not say if someone had broken her arm or importantly that it was the accused who had broken her arm. Significantly, and this appears to have been overlooked all round, both the pathologists PW5 and DW4 do not report of any arm of the deceased being broken. PW5's report (exh. P6) states: "No bony injury except the dislocation of the left ulna on the wrist". The deceased was a trained and registered nurse and she would know the difference between an arm and a wrist. For these reasons, the evidence of the voice message is of no consequence and is certainly not a strand of evidence to make a rope strong enough to hang the accused (*Chan Chwen Kong v. PP* [1962] 1 LNS 22; [1962] MLJ 307).

**[73]** Next, there was the finding that the accused proffered three different and untrue non-homicidal reasons, bronchitis, overdose of sleeping pills and overdose of a drug that he could not name, to three different witnesses, which was wholly inconsistent with his innocence. Another finding connected with this is that if he was innocent, he would not have delayed giving his consent for a post-mortem to be conducted.

**[74]** Now learned counsel for the accused submitted that the accused ought not to be criticised for giving different reasons as although the accused was a medical doctor, he was not an expert on asphyxia. Certainly if PW5, a forensic pathologist, had candidly admitted he was not experienced in asphyxia cases, it could hardly be expected of the accused to know as such cases were not common.

**[75]** Learned counsel for the accused further submitted that the accused gave the reasons of overdose of sleeping pills or drugs as he knew that the deceased was taking drugs and alcohol. The deceased was also a patient of asthma and bronchitis as confirmed by the evidence. So clearly he was not making it up.

**[76]** In this regard, we would agree that giving different answers is not an inference of guilt. Furthermore, the accused testified that he was in a state of shock and confusion and could only think of the three probable reasons of death as he did not suspect foul play. Viewed objectively, this cannot amount to a strand of evidence showing the guilt of the accused (*Dewi Nadia Alias v. PP* [2015] 3 CLJ 577).

**[77]** On the question of the accused delaying consent for the post-mortem, there was evidence that Dr Paranjit Kaur (PW3) had around 9.45am on 22 October 2007 asked the accused if a post-mortem was to be done. The decision to do so was however made only later in the evening.

**[78]** The reasons for the delay as put forward by the accused were as follows:

> Q: Did you take immediate action to send the body for post mortem?
>
> A: I did not, as I had not suspected any foul play. Further, Dr. Paranjit Kaur is not my wife's immediate family member. She is my wife's sister in-law. I waited for her brother Dr. Gurdial Singh to come before any decision is made. In fact, although my brother, Kuldip Singh had obtained the burial permit from Balai Polis, Rawang, I did not proceed with funeral arrangements immediately as I waited for my wife's immediate family members to come from Johore.
>
> Q: What time did the deceased's brother arrive on that day?
>
> A: Around 5-6 pm.
>
> Q: Why was there a delay on the post mortem?

A: I waited for her family members to arrive and also hear their decision. Can I add on? There was no delay, it was suggested to me by Dr. Gurdial. I agreed to do the mortem. There was no delay.

**[79]** This testimony of the accused was consistent with that of the deceased's brother, Dr Gurdial Singh (PW4) which was as follows:

PB: Dr Gurdial. You suggested that the post mortem being done on your sister's body.

SP4: Yes.

PB: Jitweer has no objection?

SP4: We [Dr Jitweer/myself] came to the conclusion that a post mortem be done. We are medically trained doctors. Any young person dies to determine the cause we have to do a post mortem and Dr Jitweer sent his brother-in-law with me.

PB: Is it a standard procedure?

SP4: If we can't establish the cause of death then we have to do a post mortem to find out the cause of death.

PB: Was it a consensus between you and Dr Jitweer?

SP4: Yes, Dr Jitweer agreed.

**[80]** When PW4 was re-examined by the learned DPP, this was what he said:

TPR: What do you mean by "Dr Jitweer agreed"?

SP4: Dr Jitweer said, yes go ahead with the post mortem.

TPR: Can you explain the manner Dr Jitweer agreed?

SP4: Dr Jitweer and myself have a cordial relationship. So he agreed in decent way.

**[81]** Considering the evidence in its entirety on this issue, we consider it wholly reasonable for the accused to have waited for the arrival of the deceased's family, in particular, Dr Gurdial who arrived later in the evening. A post-mortem was also not considered necessary as the accused did not suspect foul play and more importantly a post-mortem would involve cutting up the deceased - a necessary consequence of a post-mortem. In fact, to avoid cutting up the deceased, the accused had even suggested a less intrusive measure known as "gastric lavage". In the circumstances, the finding that the accused's actions in this regard were inconsistent with his innocence, was flawed and without basis.

**[82]** The final circumstantial evidence that appeared to be crucial in the final verdict was the finding that the accused was the last person to see the deceased alive. The trial judge appeared to rely heavily on the finding by the Federal Court that the accused's driver's (Khairuddin) statement, as set out earlier in para. 52 of this judgment, showed that the accused was last seen

with the deceased when alive at about 7am on that fateful morning. As we had pointed out earlier, this finding is now inconsistent with the finding of DW4 that the deceased was already dead at the time when Khairuddin is alleged to have seen her alive.

**[83]** Even leaving that aside, this finding that the accused was the last person to see the deceased alive suffers from another serious infirmity which appears to have been overlooked all round in the previous proceedings. Now the prosecution's case as stated in the charge is that the alleged murder was committed by the accused on 22 October 2007 between 7am until 8.10am. This must necessarily mean that the deceased was alive during the time stated until her death.

**[84]** However, the pathologist PW5 testified that the time of death of the deceased could be between 24 to 36 hours before the body was taken to the Sungai Buloh Hospital for the post-mortem. According to the post-mortem report (exh. P6), the body of the deceased was brought to the Sungai Buloh Hospital on 22 October 2007 at 11.15pm. By simple deduction, this would mean that the time of death of the deceased was between 11.15am to 11.15pm on 21 October 2007.

**[85]** Even taking into account that the time of death as stated by PW5 is only an estimation and may be inaccurate by a couple of hours, it was an established fact at the trial that the accused was not at the matrimonial home on 21 October 2007. He only arrived at the house on 22 October 2007 at about 6.30am when Khairuddin opened the door for him. So by virtue of PW5's evidence, the deceased had died long before the accused arrived at the matrimonial home.

**[86]** Now the prosecution is of course bound by the evidence of its own witness unless there is some plausible explanation. To this end, the learned DPP submitted that PW5 probably meant that the deceased died 24 to 36 hours from the time the post-mortem was conducted and not when brought to the hospital. Learned counsel for the accused countered that this cannot be the case as once the body is brought to the hospital, it would be put in the freezer to avoid further decomposition.

**[87]** On this issue, we have no doubt as to what PW5 meant as stated in his evidence:

> TPR: Berdasarkan bedah siasat bilakah masa kematian si mati boleh dibuat?
>
> SP5: Berdasarkan kepada penemuan tanda-tanda pada jasad si mati saya berpendapat beliau mungkin telah mati dalam masa 24 hingga 36 jam sebelum di bawa ke hospital.

**[88]** It was plain that PW5 was basing his finding on the time of death on the signs of decomposition of the body of the deceased. PW5 had noted that early decomposition stages had occurred meaning that death would have

occurred sometime back. This was supported by the evidence of DW4 who said that the areas of skin slip would occur if the head was bent in that position for a long period of time.

**[89]** In any event, it ought to have dawned on the learned DPP at the trial that this postulation of the time of death of the deceased was inconsistent with the charge against the accused as he was not in the matrimonial home during that time. It was imperative for PW5 to be recalled to clarify if there was any doubt. Since this was not done, the strict requirement of proof does not allow the court to bridge any gap in the prosecution case. It is trite law that the benefit of any doubt must be given to the accused (*Chan King Yu v. PP* [2009] 1 CLJ 601; *Omar Shaari v. PP* [2014] 1 LNS 488; [2014] 2 MLJ 586). There was in our view a clear misdirection that the accused was alive with the deceased at 7am on that fateful day.

**[90]** In the premises, it can hardly be asserted that the circumstantial evidence adduced by the prosecution and relied upon by the learned judge points unerringly to the one and only conclusion or an irresistible conclusion of the guilt of the accused. In fact, we are of the view that the strands of evidence when twisted together can hardly make a rope much less a rope strong enough to hang the accused (*Chan Chwen Kong*, *supra*).

**[91]** Additionally, a key question that has not been resolved is this - if the accused had really planned to kill the deceased as alleged by the prosecution, why would he create a story of a dead person seated when he could easily say that he found the deceased lying dead on the bed. After all, the accused did not know about positional asphyxia although he is a medical doctor. This is at least inconsistent with guilt.

**Conclusion**

**[92]** In the circumstances, and having scrutinised the whole of the evidence presented at the trial, we are of the view that appellate intervention is warranted. There was a lack of judicial appreciation of the defence case and the case as a whole resulting in a serious misdirection. Erroneous inferences were drawn from the facts by the learned trial judge. We find the conviction of the accused to be not only wholly unsafe but against the weight of evidence. There is a serious doubt as to whether the death of the deceased was homicidal.

**[93]** For the aforesaid reasons, we are of the view that the prosecution has failed to prove the charge against the accused beyond reasonable doubt. Accordingly, we unanimously allow the appeal and set aside the conviction and sentence passed by the High Court. The accused (and appellant here) is hereby acquitted and discharged.